

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1352

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT E. TATE,

Appellant.

*On Appeal from the United States District Court for the
Eastern District of New York.*

APPELLANT'S APPENDIX

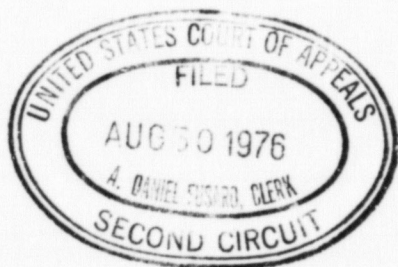
PETER J. BYRNES

Attorney for Appellant

129 Third Street

Mineola, New York 11501

(516) 746-0555



(9856)

LUTZ APPELLATE PRINTERS, INC.

Law and Financial Printing

South River, N.J.
(201) 257-6850

New York, N.Y.
(212) 563-2121

Philadelphia, Pa.
(215) 563-5587

Washington, D.C.
(201) 783-7288

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

| | Page |
|---|------|
| Docket Entries | 1a |
| Notice of Appeal (Filed June 11, 1976) . . . | 2a |
| Judgment (Filed July 22, 1976) | 3a |
| Sentence Appealed From Dated May 28, 1976 | 4a |
| Information | 15a |
| Order to Show Cause (Dated June 25, 1976) . | 19a |
| Affidavit of Peter J. Byrnes in Support of Motion (Dated June 24, 1976) | 21a |
| Affidavit of Peter J. Byrnes in Support of Motion (Dated June 24, 1976) | 23a |
| Exhibits Annexed to Foregoing Affidavit: | |
| A — Letter Dated March 11, 1976 | 28a |
| B — Newspaper Clipping | 29a |
| Notice of Motion (Dated April 1, 1976) . . . | 30a |
| Affidavit of Peter J. Byrnes in Opposition to Motion (Dated April 1, 1976) | 31a |

Contents

| | Page |
|---|------|
| Exhibit A -- Letter Dated July 14, 1975 Annexed to Foregoing Affidavit | 37a |
| Plea of Guilty (Dated April 9, 1976) | 38a |
| Affidavit of Peter J. Byrnes (Dated May 25, 1976) | 48a |
| Affidavit of Emil T. Bejsovec (Dated May 24, 1976) | 53a |
| Memorandum of Law in Support of Motion to Vacate (Dated July 7, 1976) | 57a |
| Government's Memorandum of Law in Opposition to Motion (Dated July 2, 1976) | 60a |
| Government's Memorandum of Law in Op- position to Motion | 64a |
| Stipulation (Dated July 16, 1976) | 70a |

DOCKET ENTRIES

18

CRIMINAL DOCKET - U.S. District Court

FO ☐ JUDGE/MAGISTRATE Assigned U.S.
 MO ☐ 0720
 ANOR Mis ☐ 207 1
 ADVY Fel ☐ District Office

76 CR 194

ROBERT E. TATE

LAST FIRST MIDDLE

-1

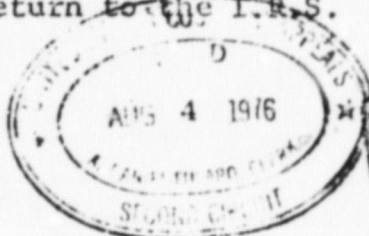
3 16

76

194

U.S. TITLE/SECTION
26-7203OFFENSES CHARGED
Did wilfully fail to make
tax return to the I.R.S.

5



II. KEY DATES & INTERVALS

| ARREST or | INDICTMENT | ARRAIGNMENT | TRIAL |
|--------------------|----------------------|-------------------------|-----------------|
| U.S. Custody Began | High Risk Date | Information X | First Trial For |
| Summons Served | Indict Waived | 4/9/76 | First Trial For |
| First Appearance | In Charging District | Supervising Indict Info | First Trial For |
| | | ct. 3 | |

| Search Warrant | Issued | Return | DATE | INITIAL NO | INITIAL APPEARANCE DATE | INITIAL TRIAL | OUTCOME |
|------------------------|--------|--------|------|------------|--|---------------|--|
| Summons | Issued | Served | | | PRELIMINARY EXAMINATION OR REMOVAL HEARING | | HELD FOR OR OTHER PROCEEDING IN DISTRICT COURT |
| Arrest Warrant Issued | | | | | INTERVIEW AND HEARING | Type Number | HELD FOR OR OTHER PROCEEDING IN DISTRICT COURT |
| COMPLAINT | | | | | | | |
| OFFENSE (in Complaint) | | | | | | | |

U.S. Attorney or Asst.

ATTORNEYS

William Brodsky

* Show last names and suffix numbers of other defendants on same indictment information

| DATE | (DOCUMENT NO.) | PROCEEDING |
|---------|----------------|---|
| 3-16-76 | | Information filed. |
| 3-26-76 | | Before PLATT, J - case called - deft & atty Peter Byrnes present - add to 4-9-76 on consent. |
| 4-2-76 | | Notice of Motion filed for plea of nolo contendere (ret 4-9-76) |
| 4-7-76 | | Govts Memorandum in opposition filed. |
| 4/9/76 | | Before PLATT, J.- Case called- deft and counsel present - deft pled and after being advised of his rights by the court and on own behalf enters a plea of guilty to count 3- sentence announced - bail contd |
| 4-23-76 | 76 M 765 | inserted in crfile |
| 5-25-76 | | Affidavit of Peter J. Byrnes filed |
| 5-28-76 | | Before PLATT, J - case called - deft & counsel present - deft sentenced to imprisonment for 1 year - execution of sentence is suspended and deft is placed on probation for 3 years on special condition that during said probation he pay all of the taxes which he owes to the Internal Revenue Service |

Docket Entries

18-1

PROCEEDINGS (continued)

PAGE TWO

penalties

and all taxes and ~~penalties~~ in connection therewith.

Default of such condition will be deemed a violation of probation. In addition and also as an added special condition of such probation deft shall pay a fine in the sum of \$10,000, which fine shall be paid on or before June 30, 1976, and a failure to pay such fine will be deemed to be a violation of defts probation. Execution of sentence stayed pending appeal. On motion of AUSA Brodsky counts 1, 2, 4 & 5 are dismissed.

Judgment and Order of probation filed - certified copies to probation.

Notice of appeal filed

Docket entries and duplicate of notice of appeal mailed to court of appeals

By PLATT, J - Order to show cause to reconsider and vacate sentence filed (ret. July 9, 1976)

Stenographers transcript dated May 28, 1976 filed Govt's memorandum of law filed.

Copy of order received from C of A directing that record be docketed by 7-12-76 filed.

Before PLATT, J. Case called. Defts motion for stay of payment of fine granted until 7/16/76. Adjd to 7/16/76 at 11:30 a.m.

By PLATT, J - Order filed withdrawing Order to show cause pursuant to Rule 35 for reduction of sentence without prejudice to the deft to renew same at the conclusion of his appellate process.

Memo of Law in support of motion to reconsider and vacate sentence filed.

Before PLATT, J. - Case called. Motion withdrawn. Payment of fine stayed to 7/23/76/

Order filed received from the court of appeals on motion made by deft dated July 19, 1976 for a stay of fine pending determination of the appeal, it is hereby granted in light of the Govts statement that it does not object, etc.

Record on appeal certified and mailed to the court of appeals

A TRUE COPY ATTEST

7/30/76
LEWIS, OFCAL

CLERK

BY *Car Paul* DEPUTY CLERK

CD NUMBER

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date **5 28 1976**

COUNSEL ☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
☐ WITH COUNSEL (Name of counsel)

PLEA ☒ GUILTY, and the court being satisfied that there is a factual basis for the plea, **in count 3** ☐ NOLO CONTENDERE, **FILED**

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged
☐ GUILTY. **FILED**

FINDING & JUDGMENT Defendant has been convicted as charged of the offense(s) of **violating T-26, U.S.C. Sec. 7203**
in that during the calendar year 1971, the defendant, by reason of his income he was required by law, following the close of the year 1971 and on or before April 15, 1972, to make an income tax return to the District Director of Internal Revenue, Brooklyn, N.Y., did wilfully and knowingly fail to make said tax return to the District Director of Internal Revenue or to any other proper officer of the U.S.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER **IT IS ADJUDGED on count 3 of the indictment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 1 year, the execution of said sentence of imprisonment is hereby suspended and defendant is placed on probation for a term of (5) years on special condition that during said probation he pay all of the taxes which he owes to the Internal Revenue Service and all interest and penalties in connection therewith. Default of such condition will be deemed a violation of probation. In addition and also as an added special condition of such probation defendant shall pay to the United States a fine in the sum of \$10,000, which fine shall be paid on or before June 30, 1976, and a failure to pay such fine will be deemed to be a violation of defendant's probation. Execution of sentence stayed pending appeal. On motion of Asst. U.S. Atty. Brodsky counts 1, 2, 4 & 5 are dismissed.**

SPECIAL CONDITIONS OF PROBATION In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation at any time during the probation period or within a maximum probation period of five years permitted by law, may have a warrant and arrest probation for a violation occurring during the probation period.

ADDITIONAL CONDITIONS OF PROBATION The court orders commitment to the custody of the Attorney General and recommends, **FILED**

COMMITMENT RECOMMENDATION **BY** *Thom C. Platt*
S. District Judge
Magistrate

FILED **976**

JUDGMENT (Filed July 22, 1976)

3a

United States of America vs.

United States District Court for

DEFENDANT

SOUTHERN DISTRICT OF NEW YORK

SYLVESTER MADDOX

DOCKET NO. 76 CR 194

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

| MONTH | DAY | YEAR |
|-------|-----|------|
| JULY | 22 | 1976 |

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

NICHOLAS E. CAPRIO, ESQ.

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully, intentionally and knowingly combining, conspiring, confederating and agreeing with others to violate Sections 173, 174, 812, 841(a)(1) and 841(b)(1)(A) of Title 21, U.S. Code. It was part of said conspiracy that the defendant unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, U.S. Code. The court asked whether defendant had anything to say why judgment should not be pronounced because no sufficient case to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: ~~The defendant be sentenced to the Federal House of Correction for the District of New York for a term of three (3) years.~~ Imposition of sentence is suspended and defendant is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this court.

SENTENCE
OR
PROBATION
ORDER

*174 of Title 21, U.S. Code. It was further part of said conspiracy that the defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, U.S. Code.

SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

MARVIN E. FRANKEL

July 22, 1976

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.



SENTENCE APPEALED FROM
DATED MAY 28, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

76-CR-194

ROBERT E. TATE,

Defendant.

United States Courthouse
Brooklyn, New York

May 28, 1976
10:00 o'clock A.M.

B e f o r e :

HONORABLE THOMAS C. HITT, U.S.D.J.

RAYMOND STELLER
OFFICIAL COURT REPORTER

BEST COPY AVAILABLE

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: WILLIAM BRODSKY, ESQ.
Assistant U.S. Attorney

PETER BYRNES, ESQ.
Attorney for Defendant

1 THE CLERK: United States of America against
2 Robert E. Tate.

3 MR. BYRNES: Good morning, your Honor.

4 THE COURT: Good morning. I have your motion
5 papers on this matter and I read them over. Is your
6 contention that by reason of the fact that, according
7 to your statement anyway, that by reason of the fact
8 that Mr. Tate went to his accountant and asked him to
9 prepare the appropriate returns and file them some
10 months before the Internal Revenue Service commenced
11 their investigation, that this was not a wilful failure
12 to file?

13 MR. BYRNES: No, your Honor. It was my inter-
14 pretation of the Probation Report which I believe the
15 Internal Revenue Service agents apparently, in reporting
16 this to the Probation Department, created what I
17 consider was a misinterpretation of the facts.

18 If you will recall, your Honor, I made an
19 application to answer a nolo contendere plea which was
20 denied by the Court. Thereafter the defendant entered
21 a plea and did admit to the wilfulness. I do not contend
22 the facts and circumstances that wilful in this case
23 could not imply, by the reason of the number of years
24 involved. But I think that they attempted to create
25 a situation by not referring to Mr. Tate and Mr. Tate

1 did seek an accountant who prepared these returns long
2 before a confidential informant allegedly went to the
3 Internal Revenue Service and also long before a visit
4 by two IRS agents was made to Mr. Tate in October of
5 1974.

6 It was that misinterpretation that I took issue
7 with.

8 THE COURT: It is a material question in my mind,
9 because if, to take a hypothetical, putting the defen-
10 dant aside for a moment, if you failed to file a return
11 this past April because of one reason or another and
12 in September because of one reason or another, you then
13 were in a position to do something about it, went to
14 the accountant, said get up a return and get it filed
15 as soon as possible, and you did that, it might take
16 some wilfulness out of it.

17 MR. BYRNES: I think it would. If we were dealing
18 with probably a case of a single year, I think that
19 would have been equally the position of the IRS. I
20 think the Internal Revenue Service took the position
21 that this is a case of six years. We do not accept the
22 personal problems that Mr. Tate was having during that
23 time as to overcome such a long basis. The fact that
24 the failure will not be implied, wilfully.

25 I, however, question seriously before advising

1 my client that I think it was a proper plea to take,
2 that perhaps the very fact that he had sought prepara-
3 tion and the filing of these returns long before the
4 Internal Revenue Service was even aware of the fact
5 that they were not filed, that that issue of wilfulness
6 might be overcome. That was not my conclusion. It was
7 the conclusion of the defendant when he entered the
8 plea that the plea was satisfactory. And the conse-
9 quences of what he has suffered throughout this have
10 been severe on him.

11 He's a person who has --

12 THE COURT: Let me interrupt you. Before we get
13 into that aspect of it, do you agree with the facts
14 as set forth in Mr. Byrnes affidavit on the motion?

15 MR. BRODSKY: No, your Honor. I must say that
16 our information is that the Internal Revenue Service
17 was informed, and frankly we believe it probably was
18 the defendant's wife who notified them --

19 THE COURT: In other words, you disbelieve the
20 accountant's statement that before they were informed,
21 he was working on this problem? The material question
22 involved here is whether he first went to the accountant
23 and said to the accountant, prepare the returns.

24 The accountant then went to work and, indeed,
25 even got material from the wife and some months later

1 from the wife. However, the informant went to the
2 Internal Revenue Service and gave them the information.
3 It is a very material fact as far as I can see.

4 MR. BRODSKY: Well, your Honor, I don't neces-
5 sarily think we would dispute Mr. Tate may have con-
6 tacted his accountant sometime earlier than the Internal
7 Revenue Service people did. But it is our understanding
8 he did not supply his accountant with the requisite
9 information and data with which the accountant could
10 actually do something.

11 There is a considerable period of time, I have
12 to refresh my recollection and get the accountant's
13 original affidavit, in which he actually did nothing
14 because Mr. Tate had not supplied the appropriate
15 information, as Mr. Byrnes said, he gave me a copy of
16 it, your Honor.

17 Yes, it indicates that he contacted his attorney --
18 his accountant on May 18, 1974. Mrs. Tate supplied
19 some information to him in November of 1973. It was
20 in February of '74, three months later, that Mr. Tate
21 called him and indicated that he had received a letter
22 from the Internal Revenue Service, that they had no
23 record of him filing and it was only thereafter that
24 they began to get together the information.

25 Your Honor, irrespective of the fact that

1 Mr. Tate contacted his accountant in 1973, he hasn't
2 filed a return since 1967.

3 THE COUP: I am cognizant of that. Counsel
4 just pointed it out. That is the reason they entered
5 their plea. It is still material, which came first,
6 whether the IRS investigators came first or whether
7 his statement to his accountant to get up the return
8 came first.

9 Apparently, even you acknowledge the latter is
10 true.

11 MR. BRODSKY: Yes, sir.

12 THE COURT: The Probation Report wasn't correct
13 in stating the first step was the inquiry by the
14 Internal Revenue Service. That is what Mr. Byrnes
15 is objecting to.

16 MR. BRODSKY: Your Honor, I must say that the
17 accountant's affidavit reads as follows:

18 "On May 18, 1973, Mr. Robert Tate paid me a
19 retainer of \$500 to prepare a joint income tax, years
20 unspecified." That is prior to that his wife, Patricia,
21 requested he assist in the preparation of the tax
22 returns to bring into our office, prior to June 30,
23 1973. Her husband's records, as well as her W-2's,
24 which she mailed to me in November of 1973, and there-
25 after it was in February of 1974 that Mr. Tate called

1 me and said he had received a letter from the Internal
2 Revenue Service indicating they had no record of his
3 filing.

4 THE COURT: They say the first step was a letter
5 from the IRS is incorrect. That's what Mr. Byrnes
6 wants a concession on.

7 MR. BRODSKY: Your Honor, when I read the pre-
8 sentence report a few days ago, I did not recall that
9 that was a key issue in the present report that --

10 THE COURT: It certainly makes some difference.
11 He wants that part of it corrected and if you and the
12 Probation Department are willing to acknowledge that
13 it is an incorrect inference arising from the report,
14 you can say it.

15 MR. BRODSKY: Your Honor, all I can be willing
16 to rely upon is the accountant's affidavit which would
17 be our evidence at trial.

18 MR. BYRNES: I certainly accept that concession.

19 THE COURT: Given that, is there anything further
20 that you feel is improper in the pre-sentence report?

21 MR. BYRNES: Without belaboring the record or
22 taking excess time, I think the Probation Report has
23 covered the impeccable character of the defendant, his
24 home life, the tragedy in his family and the fact that
25 he has a young boy who he takes care of without his

1 wife's presence.

2 I should hope your Honor will take into considera-
3 tion in imposing any sentence upon the defendant, who
4 has admitted he has violated the law of the United
5 States, and I am sure he's truthfully contrite and
6 sorry that this violation of filing these returns at
7 a legitimate time rather than basically not filing them
8 at all, does not constitute an act which should be
9 condoned, but that on the other hand his life, other
10 than that one mistake has been impeccable. I would
11 ask the Court to extend the greatest leniency in
12 imposing any sentence upon the defendant.

13 THE COURT: Mr. Tate, do you wish to say some-
14 thing?

15 THE DEFENDANT: Nothing, your Honor.

16 THE COURT: Do you wish to say anything further?

17 MR. BRODSKY: No, your Honor.

18 THE COURT: Well, as things stand right now
19 Mr. Byrnes, and I'm inclined to agree with your
20 suggestion that a jail term at this juncture may not
21 be appropriate.

22 However, I am fashioning the sentence in such
23 a fashion that unless the provisions and conditions
24 are complied therewith, the failure to comply will
25 be regarded as a violation of probation. I intend to

1 adhere it in this case, because I feel that when
2 you're talking about five or six years of failure to
3 file and the amounts that were involved here, you're
4 talking about a relatively serious offense.

5 So, it is adjudged on Count Three of the indict-
6 ment, the defendant is hereby committed to the custody
7 of the Attorney General or authorized representative
8 for a term of one year and the execution of said sentence
9 of imprisonment is hereby suspended. The defendant
10 is placed on probation for a period of five years on
11 the special condition that during said probation he
12 pay all the taxes to the Internal Revenue Service and
13 all interest and penalties assessed in connection there-
14 with. Default of such condition will be deemed a
15 violation of probation.

16 In addition, also as a special condition of
17 such parole, the defendant shall pay a fine in the
18 sum of \$10,000 on or about June 30, 1976. Failure to
19 pay such fine shall be deemed to be a violation.

20 MR. BYRNES: I respectfully ask your Honor to
21 suspend execution of that sentence so that I may discuss
22 it with Mr. Tate and if I feel that sentence is
23 excessive that I would have an opportunity to make
24 the appropriate appeal of the sentence.

25 THE COURT: Of course you may. I'm giving you

1 to June 30th in which to make the payment of the fine.
2 The only condition that will take effect immediately
3 is his probation.

4 MR. BYRNES: That I understand.

5 THE COURT: So in effect, you have 30 days
6 anyway.

7 MR. BYRNES: Thank you, your Honor.

8 MR. BRODSKY: Your Honor, may it please the
9 Court, I would ask the Court to dismiss the remaining
10 counts of the information.

11 THE COURT: Yes, motion granted.

12 MR. BYRNES: Your Honor, I would request one
13 further thing. On the civil side, both the interest
14 question and any civil penalties are still an open
15 matter. Because the IRS has not really contacted us
16 in any way, shape or form. If there is a date or a
17 dispute, shall I say, between the IRS figures and ours --

18 THE COURT: You have five years in which to
19 resolve your tax problems with the IRS. It is the
20 special condition of his probation that during those
21 five years, when you have that resolved, that he pay it.
22 Whatever the figure is. That is the special condition.

23 MR. BYRNES: No problem. Thank you very much.

24 (Whereupon, the proceeding was concluded.)

25 * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

- against -

ROBERT E. TATE,

Defendant.

- - - - - X

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE

During the calendar year 1969, the defendant, ROBERT E. TATE, who was a resident of Hempstead, New York, within the Eastern District of New York, had and received a gross income of \$52,117.11; that by reason of such income he was required by law, following the close of the calendar year 1969 and on or before April 15, 1970, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Brooklyn, at 35 Tillary Street, Brooklyn, New York, in the Eastern District of New York, or to the Director, Internal Revenue Service Center, North Atlantic Region, Andover, Massachusetts, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

Platt J
INFORMATION

Cr. No. 76 CR 194
(T. 26, U.S.C., §7203)

3-16-76

COUNT TWO

16a

During the calendar year of 1970, the defendant, ROBERT E. TATE, who was a resident of Hempstead, New York, within the Eastern District of New York, had and received a gross income of \$39,029.17; that by reason of such income he was required by law, following the close of the calendar year 1970 and on or before April 15, 1971, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Brooklyn, at 35 Tillary Street, Brooklyn, New York, in the Eastern District of New York, or to the Director, Internal Revenue Service Center, North Atlantic Region, Andover, Massachusetts, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

COUNT THREE

During the calendar year 1971, the defendant, ROBERT E. TATE, who was a resident of Hempstead, New York, within the Eastern District of New York, had and received a gross income of \$60,926.09, that by reason of such income he was required by law, following the close of the calendar year 1971 and on or before April 15, 1972, to make an income tax return to the District Director of Internal Revenue

for the Internal Revenue District of Brooklyn, at 35 Tillary Street, Brooklyn, New York, in the Eastern District of New York, or to the Director, Internal Revenue Service Center, North Atlantic Region, Andover, Massachusetts, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

COUNT FOUR

During the calendar year 1972, the defendant, ROBERT E. TATE, who was a resident of Hempstead, New York, within the Eastern District of New York, had and received a gross income of \$52,090.96; that by reason of such income he was required by law, following the close of the calendar year 1972 and on or before April 15, 1973, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Brooklyn, at 35 Tillary Street, Brooklyn, New York, in the Eastern District of New York, or to the Director, Internal Revenue Service Center, North Atlantic Region, Andover, Massachusetts, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal

Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

COUNT FIVE

During the calendar year of 1973, the defendant, ROBERT E. TATE, who was a resident of Hempstead, New York, within the Eastern District of New York, had and received a gross income of \$60,032.17; that by reason of such income he was required by law, following the close of the calendar year 1973 and on or before April 15, 1974, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Brooklyn, at 35 Tillary Street, Brooklyn, New York, in the Eastern District of New York, or to the Director, Internal Revenue Service Center, Brookhaven, Holtsville, New York, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

UNITED STATES ATTORNEY
Eastern District of New York

ORDER TO SHOW CAUSE
(Dated June 25, 1976)

At a Term _____ of the
United States District
Court, Eastern District of
New York, held at the
Courthouse located at 225
Cadman Plaza East, Brook-
lyn, New York on the _____
day of June, 1976.

P R E S E N T : HON. THOMAS C. PLATT

JUSTICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ROBERT E. TATE,

Defendant.

CR. NO. 76 CR. 194

PLATT, J.

ORDER TO SHOW CAUSE TO RECONSIDER
AND VACATE SENTENCE

-----X

S I R S :

PLEASE TAKE NOTICE, that upon the affidavits of PETER
BYRNES, ESQ., sworn to on the 24th day of June, 1976, the de-
fendant, ROBERT E. TATE, will move this Court at a Part thereof
before the Honorable Thomas C. Platt on the 4 day of July,
1976 at the District Courthouse for the Eastern District of New
York, Brooklyn, New York for an Order reconsidering and vacating
a sentence heretofore imposed upon the defendant on May 28,
1976.

BEST COPY AVAILABLE

PLEASE TAKE FURTHER NOTICE, that pending the determination of this motion, the fine of Ten Thousand (\$10,000.00) dollars hereinbefore imposed and payable on or before June 30, 1976 be and the same hereby is stayed, and

LET service of a copy of these papers be made personally on the Honorable David Trager, United States Attorney, Eastern District of New York on or before the 31st day of June, 1976 be deemed sufficient service.

Dated: Mineola, New York
June 24, 1976
25

E N T E R :

THOMAS C. PLATT
THOMAS C. PLATT, JUDGE

AFFIDAVIT OF PETER J. BYRNES IN SUPPORT OF
MOTION (Dated June 24, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

UNITED STATES OF AMERICA,
Plaintiff,

CR. NO. 76 CR. 194

PLATT, J.

-against-

ROBERT E. TATE,

AFFIDAVIT IN SUPPORT OF ORDER TO
SHOW CAUSE TO RECONSIDER AND VA-
CATE SENTENCE

Defendant.

-----X

STATE OF NEW YORK)
 ss:
COUNTY OF NASSAU)

PETER J. BYRNES, ESQ., being duly sworn, deposes and
says:

Your deponent is the attorney for the defendant,
ROBERT E. TATE, and makes this affidavit in support of a motion
to reconsider and vacate a sentence heretofore imposed upon the
defendant by the Honorable Thomas C. Platt on May 28, 1976,
which sentence was as follows:

One (1) year execution of sentence suspended;

Five(5) years probation.

Special conditions:

1. Pay all taxes, interest and penalties owed
to the Internal Revenue Service.

2. Fine of Ten Thousand (\$10,000.00) Dollars to
be paid before June 30, 1976.

Pursuant to the rules of the Honorable Thomas C. Platt, all motions must be made on eight (8) days notice to the United States Attorney and returnable on Fridays only. In view of the fact that there is not sufficient time for service of these papers on or before June 30, 1976, and for said motion to be returnable and heard by the Court, it is respectfully requested that this Order to Show Cause be granted, together with a stay of the fine pending the determination of the underlying motion.

Your deponent has been hospitalized since the date of sentence for surgery and was unable to bring this motion before this Court at an earlier date.

Dated: Mineola, New York
June 24, 1976

\$

PETER J. BYRNES

Sworn to before me this
24th day of June, 1976.

\$

NOTARY PUBLIC

PATRICIA A. MAHOFSKE
NOTARY PUBLIC, State of New York
No. 4602702
Qualified in Nassau County
Commission Expires March 30, 1977

AFFIDAVIT OF PETER J. BYRNES IN SUPPORT
OF MOTION (Dated June 24, 1976)

23a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ROBERT E. TATE,

Defendant.'

CR. NO. 76 CR. 194

PLATT, J.

AFFIDAVIT IN SUPPORT OF
MOTION TO RECONSIDER AND
VACATE SENTENCE

-----X

STATE OF NEW YORK)
 ss:
COUNTY OF NASSAU)

PETER J. BYRNES, ESQ., being duly sworn deposes and
says:

Your deponent is the attorney for the defendant, ROBERT
E. TATE, and makes this affidavit in support of a motion to re-
consider and vacate a sentence heretofore imposed upon the
defendant by the Honorable Thomas C. Platt on May 28, 1976
which sentence was as follows:

One (1) year execution of sentence suspended;
Five (5) years probation.

Special conditions:

1. Pay all taxes, interest and penalties owed
to the Internal Revenue Service.

2. Fine of Ten Thousand (\$10,000.00) dollars to
be paid before June 30, 1976.

It need not be recited that the defendant has, by his plea of guilty, admitted to a violation of Section 7203, Internal Revenue Code; 26 U.S.C. Section 7203. On the day of sentence, the Office of the United States Attorney did admit that the defendant had retained a certified public accountant for the sum of five hundred (\$500.00) dollars to prepare and file the necessary tax returns prior to any knowledge by the Internal Revenue Service that the returns had not been filed and the taxes not yet paid. As the court pointed out during the discussion of this issue, such an act on the part of the defendant would certainly affect the willfulness involved in each and every count of the information. While the defendant's plea of guilty to one (1) count of the indictment forecloses the objective issue of willfulness, it certainly left the subjective side in question.

An additional issue which was lost sight of by the litigants at the time of sentence was prior payment by the defendant of all taxes due and owing as was shown by counsel's letter dated March 11, 1976 (a copy of which is attached hereto). This fact of payment still remains uncontroverted and likewise should affect the degree of sentence imposed upon the defendant. The court, on the other hand, by imposing a special condition that the defendant pay all taxes impliedly raises a question as to whether or not all taxes have been paid. Predicated upon both of those points, it is respectfully submitted to the court

that the sentence imposed was excessively harsh and might possibly be reconsidered.

The defendant, an attorney, subsequent to the imposition of the original sentence, was held out and exposed to gross ridicule and implied misstatements of fact by the "Newsday" (see attached hereto photostated copy of article). The article does not point out that the defendant had filed his returns in 1974 or paid all taxes due thereon. On the contrary, it portrays the defendant in a most ungallant manner causing him and his young son untold ridicule.

It is respectfully requested that the terms of the sentence imposed be modified to the following extent. That the fine be reduced from Ten Thousand (\$10,000.00) dollars to twenty five hundred (\$2,500.00) dollars in that the defendant has paid all of the taxes due and is still subject to a fifty percent (50%) penalty and interest thereon. That, in addition, the terms of probation be limited to the date when all interest and penalties due the Internal Revenue Service have been paid. It is respectfully submitted that a five (5) year probationary period for an attorney who has pleaded to a single misdemeanor count and whose character and reputation have been already severely damaged constitutes a penalty in excess of that warranted under the circumstances.

Your deponent, as counsel for the defendant, fully understands that an attorney must be held to a higher level of respect for the laws than an ordinary citizen. Had, in fact, the defendant been other than an attorney and assuming the same facts and circumstances of this case existed, the defendant most probably would not have been subjected to a criminal charge.

Your deponent is informed and believes that the probation involved in this case will be unsupervised after the conditions of payment of taxes, interest and penalties have been resolved. Furthermore, it is apparent that the defendant is not a person in need of supervision by the Probation Department and that probation merely constitutes a penalty rather than a rehabilitative tool. Likewise, the public disgrace and ridicule which the defendant has suffered has seriously affected his ability to practice law in the community within which he has resided all of his life. If the defendant chose to change his place of residence, not only would he need the permission of the court and the Probation Department; but also, he would have to carry with him to his new place of residence this telltale error of his past.

It would hardly serve a purpose to attempt to compare this sentence with those imposed upon others in similar circumstances. Nonetheless, the crime upon which he stands convicted can hardly be considered one involving moral turpitude. The

requested modifications of the sentence are sought not as an act of charity but solely as an act of justice. If the defendant in this case had successfully completed and filed his returns before December of 1973, this entire matter would have been handled by the Civil branch of the Internal Revenue Service. Once the special agents of the Internal Revenue Service entered into this case, that opportunity was forever gone in view of the defendant's occupation. While the number of years in question might seem inordinate, our government not only is collecting its taxes in full, but will gain a profit of fifty percent (50%) of the tax due civilly as well as interest through the date of payment. To add on top of this a maximum fine and a maximum probationary period, seems, to your deponent, to constitute an excessive sentence under the facts and circumstances of this case.

WHEREFORE, it is respectfully prayed that this court reconsider its sentence heretofore imposed and vacate the same with the modifications as requested herein.

Dated: Mineola, New York
June 24, 1976

PETER J. BYRNES

Sworn to before me this

24th day of June, 1976.

PATRICIA A. MAKOFSE
NOTARY PUBLIC
State of New York
No. 460862
Qualified in Nassau County
Commission Expires March 31, 1977

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT:

EXHIBIT A - LETTER DATED MARCH 11, 1976

March 11, 1976

Internal Revenue Service
 114 Old Country Road
 Mineola, NY 11501

Re: Taxpayer-Robert E. Tate
 and
Patricia Tate, deceased

Gentlemen:

Previously you have advised me that you would forward a bill to the taxpayer above-named in the amount due at the conclusion of your audit. You have advised me that your audits are completed, and the returns are accepted as filed; but no bill has been received.

At this point, you have left me no alternative but to enclose to you a check from the taxpayer in the sum of forty thousand, four hundred eighty-three dollars and forty-one cents (\$40,483.41), which represents taxes for the following years:

| | |
|-------|------------------|
| 1968 | \$ 6,331.05 |
| 1969 | 7,015.60 |
| 1970 | 1,914.20 |
| 1971 | 9,157.65 |
| 1972 | 5,435.41 |
| 1973 | <u>10,029.50</u> |
| Total | \$ 40,483.41 |

Very truly yours,

Peter J. Byrnes

PJB:pm
 enc.

BEST COPY AVAILABLE

Lawyer Says Wife Turned Him In

Brooklyn—A Mineola lawyer, fined \$10,000 yesterday for failure to file his income tax, blamed his troubles on his late wife, claiming that she had inflicted on him the Internal Revenue Service after suffering depression from the birth of their first child.

The attorney, Robert Tate, 48, of 200 Cathedral Ave. Hempstead, had been charged with failure to file tax returns for a total of \$264,195 he earned from 1969 to 1971. He had entered a no contest plea. According to an affidavit filed by his attorney, Peter Byrnes of Mineola, Tate's first child, Robert, was born on July 20, 1969, after the Tates had been married 16 years. Soon after, his wife Patricia, a teacher in the Levittown schools, began to suffer "post-partum depression."

In 1969, the affidavit states, Tate received a letter from an attorney, notifying him that his wife was

going to divorce him. The letter, the affidavit continued, "came as a complete surprise, although he was becoming suspicious that her conduct was being affected by an overindulgence in alcohol."

In 1972, the affidavit said, it became necessary for Tate to place his wife in South Oaks Hospital in Amityville from April 10 to May 4 and again from May 21 to Aug. 9.

The following year, Mrs. Tate sued Tate for divorce in Family Court, but nothing became of the suit because she died of meningitis, which Byrnes described as "unrelated" to her other difficulties, in December, 1973.

"Even the circumstances surrounding her death only served to further amplify the tragedy," the affidavit continued, for "shortly prior to her death she allegedly became a confidential informant to the Inter-

nal Revenue Service, complaining of the failure of her husband to file his tax returns.

"The tragedy within which the defendant found himself between the birth of his child and the death of his wife was of such tremendous personal weight and impact that normal conduct became almost impossible," the affidavit included.

On April 9 U. S. District Judge Thomas C. Platt rejected Tate's no contest plea. The defendant then pleaded guilty to failure to file income tax for 1971 on an income of \$60,926. Failure to file for the other years in the charge was dismissed, according to Assistant U.S. Attorney William Brodsky, who prosecuted the case.

Besides fining him \$10,000, Judge Platt also sentenced Tate to a year's suspended jail term and ordered him to pay all of his taxes and penalties.

NOTICE OF MOTION
(Dated April 1, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

UNITED STATES OF AMERICA,

Plaintiff,

CR. NO. 76 CR. 194

-against-

PLATT, J.

ROBERT E. TATE,

NOTICE OF MOTION FOR PLEA
OF NOLO CONTENDRE

Defendant.

-----X

S I R S :

PLEASE TAKE NOTICE, that the defendant, ROBERT E. TATE, upon the affidavit of his attorney, PETER J. BYRNES, ESQ., will move this court, at a Part thereof, before the Honorable Thomas C. Platt on the 2nd day of April, 1976 at the District Court-house for the Eastern District of New York, Brooklyn, New York for a plea of Nolo Contendre for each and every count of the information now pending before this court, together with such other and further relief as to this court may seem just and proper.

Dated: Mineola, New York
April 1, 1976

Yours, etc.,

PETER J. BYRNES

Attorney for Defendant
Office & P.O. Address:
129 Third Street
Mineola, New York 11501
(516) 746-0555

TO: HONORABLE DAVID TRAGER
United States Attorney
Eastern District of New York
Brooklyn, New York

BEST COPY AVAILABLE

AFFIDAVIT OF PETER J. BYRNES IN OPPOSITION TO MOTION
(Dated April 1, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

UNITED STATES OF AMERICA,

Plaintiff,

CR. NO. 76 CR. 194

-against-

PLATT, J.

ROBERT E. TATE,

Defendant.

AFFIDAVIT IN SUPPORT OF A
MOTION TO ENTER A PLEA OF
NOLO CONTENDRE

-----X

PETER J. BYRNES, ESQ., being duly sworn, deposes and
says:

Your deponent is the attorney for the defendant,
ROBERT E. TATE, and duly admitted to practice in the courts of
the Eastern District of the State of New York.

The defendant, ROBERT E. TATE., stands accused by in-
formation of five (5) counts in violation of Section 7203,
Internal Revenue Code; 26 U.S.C., Section 7203 for the years
1969 through 1973.

The defendant seeks to enter a plea of Nolo Contendre
to each and every count of the information before this court
predicated upon the following reasons:

The defendant, ROBERT E. TATE., married PATRICIA TATE,
now deceased, on August 23, 1952. On the 26th day of July, 1968
approximately sixteen (16) years later, their first and only
child, ROBERT, was born. The defendant's deceased wife, PATRICIA,
was employed as a teacher with the Levittown school district
since her graduation from Teachers' College in 1952. The de-

defendant, an attorney since 1960, has been self-employed with an office in Mineola, New York. The defendant's reputation as an attorney is impeccable and above reproach.

The problems which resulted in this unfortunate situation began to emerge shortly after the birth of their child. Its nature and depth did not, however, become apparent until 1972.

In and about mid-1969, the defendant received a letter from an attorney, allegedly representing his deceased wife in an action soon to be commenced against him for divorce. The letter, as well as the desires of his wife, came as a complete surprise to the defendant although he was becoming suspicious that her conduct was being affected by an over-indulgence in alcohol. The parties continued to reside together, but his late wife embarked upon a course of conduct which left no alternative but to seek professional help. Unfortunately, the deceased, like most people in her condition, did not consider herself to be suffering from mental illness. These facts, however, were to the contrary and her failure to reveal her condition brought further tragedy to the family.

In 1971 the deceased took out a Twenty-five thousand (\$25,000.00) dollar life insurance policy wherein she failed to reveal certain meetings and discussions which she had with a client of her husbands' who was also a psychiatrist. Unfortunately, the deceased passed away one year and eleven (11) months

after the inception of the policy which the company elected to cancel on the grounds of fraud by the decedent. This matter was litigated in the Supreme Court of Nassau County and resulted in a verdict in favor of the insurance company and the loss of the Twenty-five thousand (\$25,000.00) dollar life insurance proceeds.

The conditions which surrounded the defendant's home life, as well as his business life, continued to deteriorate and become more acute. In 1972 it became necessary for the defendant to place his wife in South Oaks Hospital for the periods between 4-10-72 through 5-4-72 and again on 5-21-72 through 8-9-72 (see copy of letter dated July 14, 1975 from Pascual A. Carone, M.D., South Oaks Hospital attached hereto and made a part hereof). The diagnosis of the decedent's problem was later confirmed as "involuntional melancholia with post-partum depression" coupled with "paranoid ideation". In December of 1972, the decedent even attempted to have the Hempstead Police arrest the defendant while they were together at home. The police observed the decedent's condition and refused to act.

In 1973, the decedent retained another attorney, Meyer Goodman, Esq., who commenced a Family Court proceeding on her behalf against the defendant, which proceeding never resulted in a disposition and abated upon the death of the defendant's wife on December 31, 1973. Even the circumstances surrounding her death only served to further amplify the tragedy.

Shortly prior to the defendant's wife's death, she allegedly became a confidential informant to the Internal Revenue Service complaining of the failure of her husband to file his tax returns.

Nevertheless, prior to this act by the decedent, both she and her husband has already retained an accountant for the purpose of preparing these tax returns for which she now acted as an informant. The Internal Revenue Service is in receipt of a statement from the defendant's accountant acknowledging this fact. Because of the considerable time lapse occasioned by the length of years involved in this information, it was not possible for the accountant to have concluded the preparation and filing prior to the time when the decedent made her complaint. It is, however, beyond dispute that the preparation of these returns was already going forward.

It is the government's position that an attorney is chargeable, more so than a layman, with knowledge of his obligation under the law. Counsel for the defendant does not dispute the applicability of this statement. Nonetheless, the overwhelming psychiatric problems which confronted the defendant made the filing of these returns for the most part impossible and at a minimum impractical. The decedent, as previously mentioned, was an employed teacher. Your deponent has been informed by the defendant that the decedent refused to cooperate in any manner with the defendant in filing or preparing

these tax returns for the years 1968 through 1973. Moreover, the decedent even embarked upon a course of conduct which made it impossible to file accurate joint returns (for example: she refused to turn over any records, withholding statements or expense statements which concerned her employment, earnings and deductions). It was only after much remonstrance between the defendant and his deceased wife that the initial efforts were undertaken to correct this problem in 1973.

All returns in question, together with the books and records in substantiation thereof, were filed and audited by the Internal Revenue Service, which as yet has sent no bill or demand for interest or penalties. The defendant has paid to the Internal Revenue Service any and all taxes due and owing each of the audited returns for the years 1968 through 1973, notwithstanding any question of enforcement by reason of the Statute of Limitation. Despite the fact that the defendant is an attorney, it clearly can be seen from these facts which terminated in the unfortunate death of the defendant's wife in December of 1973 that a plea of Nolo Contendere is warranted. Where the facts point to circumstances which would normally give rise to a conclusion of willfulness, they do not under the unique circumstances of this case warrant such a conclusion. On the contrary, the tragedy within which the defendant found himself between the birth of his child and the death of his wife, was of such tremendous personal weight and impact that

normal contact became almost impossible.

WHEREFORE, it is respectfully submitted to this court that a plea of Nolo Contendere on behalf of the defendant on each and every count of the information before this court would be just and proper under the facts and circumstances surrounding the case at Bar.

Dated: Mineola, New York
April 1, 1976

Sworn to before me this 1st
day of April, 1976.

\$

NOTARY PUBLIC

PATRICIA A. MANDUCKE
NOTARY PUBLIC, State of New York
No. 4608762
Qualified in Nassau County
Commission Expires March 30, 1977

\$

PETER J. BYRNES
Attorney for Defendant
Office & P.O. Address:
129 Third Street
Mineola, New York 11501
(516) 746-0555

BEST COPY AVAILABLE

EXHIBIT A - LETTER DATED JULY 14, 1975 ANNEXED TO
FOREGOING AFFIDAVIT
SOUTH OAKS HOSPITAL

37a

(THE LONG ISLAND HOME, LTD.)

An Accredited Psychiatric Hospital

FOUNDED 1882

AMITYVILLE, L. I., NEW YORK 11701

516/264-4000

PASQUALE A. CARONE, M. D.
MEDICAL DIRECTOR

EDWARD H. MALONE, M. D.
CLINICAL DIRECTOR

LEONARD W. KRINSKY, PH.D.
ADMINISTRATOR

July 14, 1975

Re: Mrs. Patricia Tate

Mr. Robert E. Tate
200 Cathedral Avenue
Hempstead, N.Y.

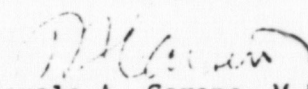
Dear Mr. Tate:

Following is the information you require for submission
to the Internal Revenue Service:

Mrs. Patricia Tate was hospitalized at this hospital from
April 10, 1972 to May 4, 1972, and from May 21, 1972 to August 9,
1972, for the care and treatment of a nervous disorder. According
to her history, her illness dated back to the birth of her child
in 1969.

The diagnosis in this case was Depressive Neurosis with
Habitual Excessive Drinking.

Sincerely yours,


Pasquale A. Carone, M.D.
Medical Director

MH/mh

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

-against- :

ROBERT E. TATE, :

Defendant. :

-----X

76-CR-194

Criminal Cause
for Pleading

U.S. District Courthouse
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

April 9, 1976 10:00 A.M.

B E F O R E :

HONORABLE THOMAS C. PLAT, USDJ.

GERALD BEATTIE
Acting Official Court Reporter

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York
225 Cadman Plaza East, Brooklyn, New York 11201

BY: MR. WILLIAM BRODSKY, ESQ.
Assistant U.S. Attorney

PETER BYRNES, ESQ.
Attorney for the Defendant

MR. BYRNES: Your Honor, this is a motion.

THE COURT: I am going to have to deny your motion. I don't see the basis for it.

MR. BYRNES: Would you, in view of that denial, accept the entry of a plea today, at this time?

THE COURT: I would rather do it at the end of the motion calendar.

MR. BYRNES: Certainly.

(Whereupon the case was set aside and later recalled.)

MR. BYRNES: At this time, your Honor, the motion to enter a plea of nolo contendere having been denied, we offer to enter a plea to count three of the information number 76-CR-194, a plea of guilty.

THE COURT: Mr. Tate, before accepting a plea, I have to ask you certain questions.

You don't have to answer any questions. You may remain silent throughout this procedure. If you start, you may stop at any time. Anything you say may be used against you, and you have counsel of your own choice here with you. So, you may consult him at any time during the course of these proceedings,

but before accepting a plea of guilty, as your counsel suggested you wished to enter, have you been advised that if you want to go to trial you have a right to proceed to trial and be represented by counsel?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you have a right to subpoena and to obtain witnesses in your behalf at the time of such trial?

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to be confronted by witnesses against you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you have a right to plead not guilty to the information, or persist in your plea of not guilty?

THE DEFENDANT: I do, your Honor.

THE COURT: If you went to trial, the Government would have the obligation of proving your guilt beyond a reasonable doubt?

THE DEFENDANT: I understand that.

THE COURT: And if they fail to do so, the jury would have the duty to acquite you?

THE DEFENDANT: Yes, sir..

THE COURT: If the plea is accepted, you would be waving your constitutional right to a jury trial?

THE DEFENDANT: I do.

THE COURT: Do you understand you will have the assistance of counsel at the time I place sentence if your plea is accepted?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand what you are charged with having done in count three of the information?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand specifically you are charged during the calendar year 1971, when you were a resident of Hempstead, you had received a gross income of \$60,926.09. By reason of such income you were required by law following the close of the calendar year 1971 on or about or before April 15, 1972, to make income tax returns to the District here at 35 Tillary Street, Brooklyn, in this District, or the district in Andover, Mass., stating specifically the amount of your gross income, deducting credits to which you were entitled to; that you willfully, knowingly failed to make know, failed to make said

income tax return either to said District or any proper office of the United States.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Did you actually do what you are charged with?

THE DEFENDANT: Your Honor, the allegations contained in that--I did not by April 15, 1972, file a tax return for the calendar year '71, it's true. I discussed with counsel. I have filed a tax return for the year, all other years, your Honor, and paid all the taxes. I'm not sure of the figure contained in the information is correct.

MR. BYRNES: The return I arrived at, \$60,926.09, your Honor is--we never received any bills vis-a-vis these years.

THE COURT: The figures are approximate.

THE DEFENDANT: The tax returns were filed on behalf of myself and my wife in joint returns.

THE COURT: When did you file those returns?

THE DEFENDANT: They were filed about a year and a half ago.

THE COURT: That would be 1974.

THE DEFENDANT: I think December of '74 is correct.

THE COURT: You were aware--the question is now whether you knowingly and willfully failed to file returns on or before April 15, 1972?

THE DEFENDANT: That is ture.

THE COURT: Have any promises been made to you as to what sentence will be imposed either by the United States attorney, your lawyer, this court, or anyone else to induce you to enter a plea of guilty?

THE DEFENDANT: No.

MR. BRODSKY: Move to dismiss the remaining counts of the indictment.

THE COURT: Has your lawyer express any opinion or any prediction as to what sentence the Court will impose?

THE DEFENDANT: No, he hasn't.

THE COURT: Have you been threatened by anyone to induce a plea of guilty?

THE DEFENDANT: No.

THE COURT: Are you entering a plea of guilty voluntarily because you are guilty and for no other reason?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed your plea of guilty with your attorney?

THE DEFENDANT: Yes.

THE COURT: Did you personally enter into any discussion with anyone in the U.S. Attorney's office?

THE DEFENDANT: No, I did not.

THE COURT: Do you know what the maximum sentence which can be imposed for this offense is?

THE DEFENDANT: Yes, I do. It is one year, and/or \$10,000, or both.

THE COURT: How old are you?

THE DEFENDANT: Forty-eight years of age.

THE COURT: Having been advised as to your constitutional rights, the nature of the charges, given the consequences of your plea, how do you plead to count three of the information, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: I find that there is basis for the plea. I accept the plea of guilty to count three of the information.

What is the bail at the moment?

MR. BRODSKY: Your Honor, the defendant has never had any bail set. The United States would have no objection to him remaining on his own recognizance. He has come voluntarily for two appearances before the court.

THE COURT: I think it would be probably advisable to have him sign before a magistrate a \$5,000 personal recognizance bond and not require him to put up any security or anything of that nature, just sign for his appearance.

MR. BRODSKY: Fine.

THE COURT: And he will be notified, roughly six weeks hence. In the meantime, you should go to probation, the Probation Department, with your attorney and get a pre-sentence report.

MR. BYRNES: Your Honor, is it possible, I have to enter Sloane-Kettering the 29th of April. I may, subsequently after that visit, be sent back to Sloane-Kettering for major surgery. Is it possible we could take the sentence before the 29th, or is that physically impossible?

THE COURT: You can ask the probation officer, who is right behind you, but I think, as a practical matter, it is almost impossible, particularly

47a

Tate/Plea

10

with Easter, and what have you, holidays coming up.

If you can persuade them to expedite, I am here.

Take it up with them.

AFFIDAVIT OF PETER J. BYRNES (Dated May 25, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----x

UNITED STATES OF AMERICA,

PLATT, J.

-against-

Cr. No. 76 CR 194

ROBERT E. TATE,

(T. 26, U.S.C. §7203)

Defendant.

AFFIDAVIT

-

-----x

PETER J. BYRNES, ESQ., being duly sworn, deposes and says:

Your deponent is the attorney for the defendant, ROBERT TATE, and makes this affidavit with reference to certain erroneous information contained in a probation report filed in this matter by James F. Haran, Chief, U.S. Probation Officer.

On page 8 of the probation report, it is stated that the defendant paid forty thousand four hundred eighty-three dollars and forty-one cents (\$40,483.41) to be applied against his civil tax liability for the years 1969 through 1973. Attached hereto is a copy of your deponent's letter dated March 11, 1976 wherein your deponent submitted a check to the Internal Revenue Service in the aforesaid sum which represented payment for the tax years 1968 through 1973. The agent's advice to the Probation Department that the defendant still has an outstanding civil liability of seven thousand four hundred seventy-three dollars and eighty cents (\$7,473.80) on his 1968 return is contrary to the facts and to the acceptance of the payment as offered by your deponent on March 11, 1976.

Apparently, the Internal Revenue Service is attempting to create the illusion that the defendant is attempting to avoid payment of his 1968 tax. In doing so, they have completely misled the Department of Probation as the attached letter clearly reflects. Moreover, the figures regarding the taxable income and tax due for the respective years on page 8 of the report do not appear to coincide with the returns as filed by the taxpayer. Since neither your deponent nor the defendant has ever received any correspondence from the Internal Revenue Service regarding his filed returns or his civil liability, any reference to the amount thereof cannot be disputed by the defendant at this time. The defendant is aware, however, that a substantial sum of money is still to be paid and has been unable to resolve the problem for lack of information from the Internal Revenue Service. It would appear to your deponent that the Internal Revenue Service in cases such as these, by its failure to submit audits and bills to a prospective defendant is thereby precluding his payment of his civil liability which furthers an illusion of wrongdoing.

This now leads your deponent to that part of the report which ignores another crucial fact surrounding the alleged failure to file. This report attempts to create the impression that a confidential informant's statements to the Internal Revenue Service in December of 1973 constitutes the sole reason which subsequently prompted the defendant to file. This is categorically untrue and the Internal Revenue Service knew the opposite to be the case. Furthermore, any attempt to further such an

impression is a gross distortion of the truth.

Submitted herewith is an affidavit of Emil T. Bejsovec, Mr. Tate's accountant. It was Mr. Bejsovec's previous affidavit of March 3, 1975 to the Internal Revenue Service which is misinterpreted. The second sentence of that affidavit states that Mr. Tate met with Mr. Bejsovec on May 18, 1973 at which time he paid Mr. Bejsovec a retainer of five hundred (\$500.00) dollars and asked Mr. Bejsovec to prepare and file his tax returns. The probation report is totally silent about this payment. On the contrary, the agents of the Internal Revenue Service appear to have advised the Probation Department that it was not until after their personal visit to the defendant in October of 1974 that effective efforts were taken by the defendant to complete the filing of his returns. Reference to the affidavit of Mr. Bejsovec, sworn to May 24, 1976, creates the true picture of a taxpayer who concededly did not timely file his returns, but clearly evidenced an intent to do so as early as April of 1973.

I am sure that the court is aware of the enormous difficulty in preparing returns for such an extensive period, together with the gathering of records in support thereof. This is especially true for a single practitioner whose bookkeeping obviously left something to be desired. Without condoning the defendant's late filing, it is certainly misleading to allude to his wife's efforts to file returns without, at the same time, mentioning his.

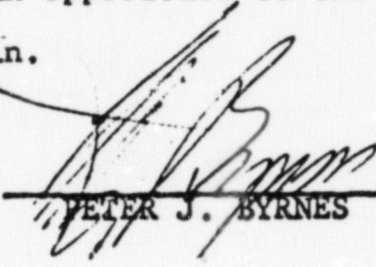
The confidential informant mentioned in the probation report was the defendant's deceased wife. At the time she brought this information to the Internal Revenue Service, she was suffering extreme emotional disturbance and alcoholism. What greater proof of her instability do we need when we find her reporting her husband's failure to file while at the same time she is turning over records to her husband's accountant immediately prior thereto. Surely, she must have been aware in December of 1973 that her husband had already retained Mr. Bejsovec to prepare the returns. Likewise, she must have been aware of this when she submitted to Mr. Bejsovec additional records in November of 1973, which for the first time included her W-2 forms.

To say that the defendant's ability to maintain his law practice while attempting to deal with his wife's mental illness and alcoholism evidences an intent to willfully fail to file is to continue to distort both the facts and reality. The defendant is an attorney who had an obligation to his clients which had apparently been well performed. It is now this performance that is used against him to exemplify that he did not suffer during his wife's long mental illness. While this conclusion may be drawn by agents of the Internal Revenue Service, it should not be drawn by the Probation Department, and in your deponent's opinion, would not had the report referred to the retainer of May, 1973. The failure of the agents

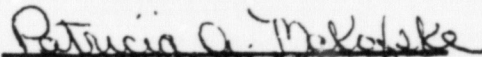
of the Internal Revenue Service to objectively treat the facts as shown in Mr. Bejsovec's current affidavit has prevented the Probation Department from submitting to this court an inaccurate background of the facts and circumstances leading up to the charges in this case and to the defendant's plea.

This Affidavit is submitted in opposition to the Probation Department's report filed herein.

Dated: May 25, 1976
Mineola, New York


PETER J. BYRNES

Sworn to before me this
25th day of May, 1976.


NOTARY PUBLIC

PATRICIA A. MAKOSKE
NOTARY PUBLIC, State of New York
No. 4608762
Qualified in Nassau County
Commission Expires March 30, 1977.

AFFIDAVIT OF EMIL T. BEJSOVEC (Dated May 24, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERT E. TATE,

Defendant.

PLATT, J.

Cr. No. 76 CR 194
(T. 26, U.S.C. §7203)

AFFIDAVIT

-----X

EMIL T. BEJSOVEC, being duly sworn, deposes and says:

Your deponent is a Certified Public Accountant with offices in Woodbury, New York.

Your deponent was, and still is, the accountant for the defendant, ROBERT E. TATE, and makes this Affidavit in support of what has been reported to me as a misinterpretation of my statement dated March 3, 1975 and given to Special Agent McQuade of the Internal Revenue Service.

Although I have not read the probation report filed in this case, it is alleged therein that my prior statement conflicts with the defendant's position that he sought to comply with the tax laws of the United States and to file his returns before either a confidential informant went to the Internal Revenue Service in December of 1973 or the Internal Revenue Service notified the defendant in February of 1974 of his failure to file his returns. Any statement attributed to me to the aforesaid effect is absolutely untrue and a gross distortion of the facts in this case as well as my previous statement.

According to my records, it appears that some time in February of 1972, I either met or spoke with the defendant. Unfortunately, my records do not reveal the subject matter of that conversation or meeting.

In early April of 1973 the defendant's deceased wife, PATRICIA TATE, met with me for the purpose of having their joint tax returns filed. Before April 15, 1973, I personally spoke with the defendant about these returns and the papers that would be necessary for their preparation.

On May 18, 1973 I met with the defendant who paid me a retainer of Five Hundred (\$500.00) Dollars to prepare and file his tax returns for the years 1968 through 1972. Prior to June 30, 1973 PATRICIA TATE brought to me records for both herself and the defendant relative to the years in question.

These records were insufficient and further records were thereafter requested.

On November 29, 1973 PATRICIA TATE sent to me by mail additional records, which for the first time, included her W-2 forms from her separate employment.

In February of 1974 after the defendant's wife passed away, the defendant called to advise me that he had received a letter from the Internal Revenue Service about his returns from the years 1968 through 1972. He responded to the Internal Revenue Service advising them that I was preparing these returns. A copy of this letter and the defendant's response were thereafter sent to me at my office by the defendant.

Between February of 1974 and October of 1974 your deponent was attempting to prepare these returns. At no time during this period did the defendant refuse me any of his records or attempt in any way to prevent my completion of the filing. Any reference of the Internal Revenue Service agents that the defendant only gave to me his records after a personal visit by their agents to the defendant's office in October of 1974 is a distortion of the facts and untrue.

Because of the number of years in question, it was necessary for me to seek additional records from the defendant after October of 1974, but these were for the purpose of assisting me in the preparation of the returns which preparation had already been commenced prior thereto.


In conclusion, the defendant, prior to December of 1973, cooperated with me and paid me a retainer with the express purpose of complying with the tax laws of the United States despite the fact that their preparation and filing would be late. The defendant explained to me that his failure to do so earlier stemmed from personal problems which I subsequently became aware of during my meetings with the defendant's deceased wife between April of 1973 and November of 1973. Although I was not specifically aware of the nature of the defendant's wife's problems, it was clear that on periods when I met and talked with her, she would be unnatural and, at times, intoxicated.

This Affidavit was requested and prepared by the attorney for the defendant, ROBERT E. TATE, and executed by me for the purpose of submission to the Probation Department of the United States of America in the above-entitled matter.

Dated: Mineola, New York
May 21, 1976

Emil T. Bejsovec
EMIL T. BEJSOVEC

Sworn to before me this
24th day of May, 1976.


NOTARY PUBLIC

PETER J. BYRNES
NOTARY PUBLIC, State of New York
No. 31-4609184
Qualified in New York County
Cert. Filed in New York County
Commission Expires March 26, 1977

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE
(Dated July 7, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

UNITED STATES OF AMERICA,

-against-

76 CR 194

ROBERT E. TATE,

Defendant.

-----X

MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
RECONSIDER AND VACATE
SENTENCE

PETER J. BYRNES
Attorney for Defendant
ROBERT E. TATE
129 Third Street
Mineola, New York 11501
(516) 746-0555

TO: DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

BEST COPY AVAILABLE

This motion is brought pursuant to FED. RULES Cr. Proc. Rule 35, 18 U.S.C.A., which governs the correction of sentences heretofore imposed, and it provides that ".....The court may reduce a sentence within one hundred twenty (120) days after the sentence is imposed, or within one hundred twenty days (120) after receipt by the court of a mandate issued upon affirmant of the judgment or dismissal of the appeal.....".

The defendant has duly filed his Notice of Appeal and has been advised by the Clerk of the 2d Circuit for the United States Court of Appeals of the following time scheduling: July 12, 1976-file transcript; August 11, 1976-file appellant's brief; September 10, 1976-file respondent's brief; and September 27, 1976-argument of appeal (c/a reference No. T-6157). In the matter of the UNITED STATES v GRABIN 309 F 2d 783 (1962), the 2d Circuit, by implication, held that once an appeal has been perfected, the District Court has no jurisdiction under Rule 35 to reduce a sentence until such time as the appellate process has been completed. Nonetheless, the defendant has not perfected his appeal at this time; and for that reason, this court still has jurisdiction.

While the defendant is aware of the cases in the 9th Circuit and the District of Columbia to the contrary, it appears more reasonable to permit the court to entertain this application at a time while the transcript of sentencing has not yet been filed.

In the event the court were to conclude that it was without jurisdiction to entertain this application, it is respectfully requested that the motion be denied without prejudice pending the conclusion of the appellate process. It is further respectfully requested that the court stay the payment of the fine as previously imposed until such time as the appellate procedure has likewise been completed.

Dated: Mineola, New York
July 7, 1976

Respectfully submitted,

PETER J. BYRNES
Attorney for Defendant
ROBERT E. TAYLOR
129 Third Street
Mineola, New York 11501
(516) 746-0555

TO: DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

60a

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION
TO MOTION (Dated July 2, 1976)

RJD:WMB:mt
F.#761,308

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

76 CR 194

- against -

ROBERT E. TATE,

Defendant.

----- X

GOVERNMENT'S MEMORANDUM OF LAW

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

WILLIAM M. BRODSKY
Assistant U.S. Attorney

This memorandum is submitted in opposition to the defendant's motion for a reduction of sentence. We take no position on the merits of the defendant's motion and direct our attention solely to its jurisdictional predicate.

The defendant Robert E. Tate pled guilty on March 31, 1976 to one count of a five count information charging him with wilfull failure to file his federal income tax returns for the years 1969 through 1973 in violation of Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C. §7203).

On May 28, 1976, this Court sentenced the defendant to pay a \$10,000 fine and to serve one year in jail. Execution of the jail term was suspended and the defendant was placed on probation for five years on the special conditions that he pay the fine by June 30, 1976 and that he pay all taxes, interest, and penalties. On June 7, 1976, counsel for the defendant filed a notice of appeal from this Court's sentence.

We submit that the filing of the notice of appeal divested this Court of jurisdiction to entertain the instant motion. Once a notice of appeal is filed the District Court has no jurisdiction to act upon a motion to reduce sentence under Rule 35 of Federal Rules

of Criminal Procedure. United States v. Mack, 466 F.2d 333 (D.C. Cir.), cert. denied sub. nom., Johnson v. United States, 409 U.S. 952 (1972); United States v. Burns, 446 F.2d 896 (9th Cir. 1971); United States v. Dabney, 397 F. Supp. 782 (E.D. Pa. 1975). The time periods provided by Rule 35 are mandatory and cannot be enlarged by the District Court. United States v. Reeves, 40 F.R.D. 93 (S.D.N.Y. 1966).

Only when the sentence imposed is illegal on its face will an exception be tolerated, United States v. Mack, supra, 466 F.2d at 340. Such is not the case at bar. The maximum sentence that may be imposed for a violation of 26 U.S.C. §7203 is imprisonment for not more than one year and a fine of \$10,000 for each count. The probationary period is specifically authorized by 18 U.S.C. §3651. Neither of the special conditions exceeds the Court's discretion, cf., United State v. Pastore, _____ F.2d _____, 2d Cir., No. 75-1428, decided June 21, 1976. The defendant's sentence clearly falls within the maximum allowed by law and is not illegal.

CONCLUSION

Defendant's motion must be denied for lack of jurisdiction.

Dated: Brooklyn, New York
July 2, 1976

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

William M. Brodsky
Assistant U.S. Attorney
(Of Counsel)

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION
TO MOTIONRJD:WMB:mt
F.#761,308UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

76 CR 194

- against -

ROBERT E. TATE,

Defendant.

----- X

GOVERNMENT'S MEMORANDUM IN OPPOSITION

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201William M. Brodsky
Assistant U.S. Attorney
(Of Counsel)

MEMORANDUM OF THE UNITED STATES
IN OPPOSITION TO DEFENDANT'S MOTION
TO ENTER A PLEA OF NOLO CONTENDERE

This memorandum is submitted in opposition to the defendant's motion to enter a plea of nolo contendere to the information in this case.

The defendant is an attorney charged in a five count information with failing to file federal income tax returns for the years 1969 through 1973. He has moved this Court to permit him to enter a plea of nolo contendere primarily because he suffered personally as a result of his now deceased wife's emotional problems. The birth of a child late in life assertedly caused his wife to suffer an emotional breakdown attended by severe alcohol abuse. In his motion, the defendant asserts that the marital discord and threatened divorce proceedings resulting from his wife's emotional problems were the cause of his failure to file his income tax returns for six consecutive years.^{1/}

The defendant, as he must, acknowledges that his wife's emotional problems did not debilitate him from practicing law and performing all the routine functions

^{1/} Prosecution for the first year the defendant did not file a return, 1968, is barred by the statute of limitations.

LE

which demand the time and attention of a busy attorney, e.g., keeping track of his billable hours and billing clients; depositing his business receipts in his bank accounts; paying his rent; etc.

The defendant avers, however, that he did not file his tax returns because his wife had earned income for some of the years in question and she refused to tell him her salary or provide him with copies of her W-2 Forms. The defendant thus attempts to excuse his failure to file any returns for the six-year period, on the theory that as a married man he was entitled to the benefit of joint tax rate and his wife's refusal to provide him with her income data (and presumably to sign the returns) rendered him unable to file jointly.

We believe that these reasons proffered by the defendant are insufficient to warrant this Court's acceptance of a nolo contendere plea in this case.^{2/} Whether to accept such a plea is, of course, a matter solely within the discretion of the Court to be accepted "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice" Rule 11, Fed. R. Crim. P. See also, Mason v. United States, 250

^{2/} We of course do not consent to the entry of such a plea in this case as it is contrary to a long-standing policy of this office and of the Department of Justice. See generally, United States v. Jones, 119 F. Supp. 288, 289-290 n.1 (S.D. Cal. 1954).

F.2d 704 (10th Cir. 1957); United States v. Chin Doong Art, 193 F. Supp. 820 (E.D.N.Y. 1961); United States v. Baqliore, 182 F. Supp. 714 (E.D.N.Y. 1960).

The primary purpose of accepting a plea of nolo is to promote the administration of justice. This means justice not only for the defendant but also for the public. The Court cannot permit its action with respect to a plea of this type to breed contempt for law enforcement. United States v. Chin Doong Art, supra, 193 F. Supp. at 823, (Bartels, J).

The plea is often proffered in anti-trust actions "for the reason that proof in such actions is difficult and that the border line between legal and illegal action has been frequently blurred." United States v. Baqliore, supra, 182 F. Supp. at 716. Such is not the case at bar.^{3/} The complete failure by an attorney to file any returns for six years is clearly a criminal act if willful. Evidence of willfulness is found in the defendant's profession; in his consistent filing of returns in years prior to 1968; and in the amount of his gross income for the years in question--\$264,195.50. We submit that the defendant should not now be heard to claim that he did not know that he was required to

^{3/} In tax cases nolo contendere pleas are sometimes tendered in order that defendants will not be barred by the doctrine of res judicata from further contesting their civil tax liability. See, e.g., United States v. Dorman, 496 F.2d 440 (4th Cir. 1974); Moore v. United States, 360 F.2d 353 (4th Cir. 1966). The defendant in the case at bar, however, has not relied upon this reason in asking this Court to accept his nolo plea, and we therefore shall not address ourselves to it.

4.

file returns. Accordingly, his failure to do so in the face of his knowing obligation was willfull. United States v. Bishop, 412 U.S. 346, 360 (1973); Spies v. United States, 317 U.S. 492 (1943); United States v. Murdock, 290 U.S. 389 (1933); United States v. Schipiani, 362 F.2d 825 (2d Cir.) cert. denied, 385 U.S. 934 (1966); United States v. Matosky, 421 F.2d 410 (7th Cir.), cert. denied, 398 U.S. 904 (1970).^{4/}

Moreover, we point out that far from negating willfullness, evidence of the defendant's personal problems would not even be admissible on the issue at trial.

Bernabei v. United States, 473 F.2d 1385 (6th Cir.) cert. denied, 414 U.S. 825 (1973).

^{4/} Although Schipiani and Matosky have been impliedly overruled by Bishop to the extent they purported to distinguish between willfulness in tax felonies versus misdemeanors their definitions of willfulness are still valid. See, United States v. Bishop, supra, 412 U.S. 346, 360, n. 8.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the defendant's motion to enter a plea of nolo contendere should be denied.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

William M. Brodsky
Assistant U.S. Attorney
(Of Counsel)

STIPULATION
(Dated July 16, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ROBERT E. TATE,

Defendant.

-----X

CR. NO. 76 Cr. 194 (PLATT, J.)

STIPULATION WITHDRAWING MOTION
PURSUANT TO RULE 35

IT IS HEREBY STIPULATED AND AGREED by and between
PETER J. BYRNES, ESQ., attorney for the defendant, ROBERT E. TATE,
and DAVID G. TRAGER, United States Attorney, that a motion by
the defendant brought pursuant to an Order to Show Cause request-
ing relief pursuant to Rule 35 of the Federal Rules of Criminal
Procedure for an Order modifying a sentence hereinbefore imposed
by the Honorable Thomas C. Platt be and the same hereby is with-
drawn without prejudice to the defendant to renew the same at
the conclusion of his appellate process.

Dated: Brooklyn, New York
July 8, 1976
16th

PETER J. BYRNES, ESQ.
Attorney for Defendant

SO ORDERED:

U.S.D.J.

DAVID G. TRAGER
United States Attorney

by: William Brodsky
WILLIAM BRODSKY
Assistant United States
Attorney

STAY FINE UNTIL 9/23/76

BEST COPY AVAILABLE

**federal
FEDERAL COURT
SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

- against -

ROBERT E. TATE,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York

That on the 30th day of August 19 76 at 225 Cadman Plaza Brooklyn, N.Y.

deponent served the annexed appellant's Appendix upon

David Trager, U.S. Attorney Eastern District
the appellee in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 30th
day of August 19 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 414623106
Qualified in Queens County
Commission Expires March 30, 1978

Victor Ortega
VICTOR ORTEGA